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IN THE

Supreme Court of the United States

October Term, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; OOCL-UK, LTD.; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P&O CONTAINERS (TFL) LIMITED; and SEA-LAND SERVICE, INC.,

Petitioners,

v.

FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; and WEST GULF MARITIME ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

This case presents significant questions never previously decided by this Court relating to the reconciliation of federal labor and shipping regimes—questions which this court observed in an earlier, related case "present difficult and complex problems which are not properly before us." *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 512 (1980); *see also NLRB* v. *International Longshoremen's Association*, 473 U.S. 61, 70 n.10 (1985). These questions are:

1. May a federal agency in determining a substantive violation of its own organic statute refuse to consider and thereby frustrate the purposes and policies of another federal statute?

2. Is the preservation of work pursuant to valid provisions of a collective bargaining agreement a substantive right protected by national labor law?

3. May the Federal Maritime Commission in applying an "unreasonableness" standard to determine the legality under federal shipping law of work preservation provisions upheld by this Court under federal labor law refuse to consider the labor purposes of the agreement and the congressional goals and policies of national labor law?

Parties

All parties in the court of appeals appear in the caption with the exception of United States Lines, Inc., a petitioner in the court of appeals, which is the debtor in a pending proceeding under Chapter 11 of the Bankruptcy Act. *In re United States Lines*, No. 86-B-12240 (Bankr. S.D.N.Y. filed Nov. 24, 1986).

In accordance with Sup. Ct. Rule 28.1, it should be noted that none of the petitioners has a corporate parent, subsidiary or affiliate with the following exceptions:

- Atlantic Container Line, Ltd. is affiliated with Atlantic Container Line BV and has a non-wholly-owned subsidiary, Container Finance (Bermuda) Limited.
- As of 1981 OOCL-UK, Ltd.* was jointly owned by Canadian Pacific, Ltd., Compagnie Maritime Belge S.A. and Orient Overseas (Holdings) Limited, three publicly-owned corporations which were financially responsible for its winding down. Since January 1, 1984, the container transport service of OOCL-UK, Ltd. has been owned and operated by a wholly-owned subsidiary of Orient Overseas (Holdings) Limited.
- P&O Containers (TFL) Limited** is a wholly-owned subsidiary of P&O Containers Limited, which in turn is a subsidiary of a publicly owned corporation, Peninsular & Oriental Steam Navigation Company.
- Sea-Land Service, Inc. is a subsidiary of Sea-Land Corporation, which in turn is a subsidiary of a publicly-owned corporation, CSX Corporation.

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* In the court of appeals OOCL-UK, Ltd. appeared under its former name, Dart Containerline Company, Limited.

** In the court of appeals P&O Containers (TFL) Limited appeared under its former name, P & OCL (Trans Freight Lines) Limited.

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; ATLANTIC CONTAINER LINE, LTD.; OOCL-UK, LTD.; HAPAG-LLOYD AKTIENGESELLSCHAFT; "ITALIA" S.P.A.N.; NEDLLOYD LINES, B.V.; PUERTO RICO MARITIME SHIPPING AUTHORITY; TRANS FREIGHT LINES, INC.; P&O CONTAINERS (TFL) LIMITED; and SEA-LAND SERVICE, INC.,

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FEDERAL MARITIME COMMISSION; UNITED STATES OF AMERICA; AMERICAN TRUCKING ASSOCIATIONS, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.; FLORIDA CUSTOM BROKERS AND FORWARDERS ASSOCIATION; INTERNATIONAL ASSOCIATION OF NVOCCS; and WEST GULF MARITIME ASSOCIATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

This case concerns the right of longshoremen to preserve work in the face of technological change. On the basis of a discretionary standard under federal shipping law the Federal Mari-

time Commission invalidated the Rules on Containers, the collectively bargained response to the technological displacement of longshore work occasioned by the increasing use in the shipping industry of automated cargo handling techniques. After more than fifteen years of litigation before the National Labor Relations Board ("NLRB"), eight district courts, and six courts of appeals the Supreme Court upheld these same Rules as lawful work preservation provisions under federal labor law. *NLRB* v. *International Longshoremen's Association* (*ILA-II*), 473 U.S. 61 (1985); *see also NLRB* v. *International Longshoremen's Association* (*ILA-I*), 447 U.S. 490 (1980). Nonetheless, the Federal Maritime Commission ("FMC") affirmed by the court of appeals refused to take labor considerations into account in adjudging the reasonableness of the Rules under federal shipping law. In light of the importance of defining the scope of an agency's duty to reconcile overlapping federal statutory policies, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the court of appeals, which is reported at 854 F.2d 1338, is reproduced as Appendix A in the separately bound appendix to this petition (App. A. at 1a-69a).[1] The FMC's decision (App. B. at 70a-201a) appears unofficially at 24 Shpg. Reg. Rep. (P&F) 411 (1987). The Commission had reversed the initial decision of its chief administrative law judge (App. C. at 202a-268a), which is reported at 22 Shpg. Reg. Rep. (P&F) 1660 (1985).

Jurisdiction

The judgment of the court of appeals (App. D at 269a) was entered on August 9, 1988. This petition is being filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

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[1] References are to the pages of the separately bound appendix.

Statutes

The relevant statutes are sections 14 Fourth, 16 First, 17 and 18(a) of the Shipping Act, 1916, 46 U.S.C. §§ 812 Fourth, 815 First, 816, and 817(a) (1982); section 4 of the Intercoastal Shipping Act, 1933, 46 U.S.C. § 845(a) (1982); sections 10(b)(6)(C), 10(b)(11) - (12), and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(b)(6)(C), 1709(b)(11)-(12), and 1709(d)(1) (Supp. III 1986); and section 5 of the Maritime Labor Agreements Act, Pub. L. No. 96-325, 94 Stat. 1021 (1980), *codified* at 46 U.S.C. § 841c (1982). The complete texts of these statutes are reproduced in the separately bound appendix (App. E at 270a-274a).

Statement of the Case

The Rules on Containers are a work preservation agreement forged during the turbulent history of a labor struggle that has raged in the shipping industry without interruption for the past 30 years. Automation and its job-eroding effects precipitated lengthy strikes in 1959, 1962, 1964, 1968, 1971 and 1977. The focus of contention has been the employers'[2] increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by radically decreasing the need for the traditional piece-by-piece loading and unloading of oceanborne cargo by longshoremen (App. A at 7a-8a; App. B at 76a-81a; App. C at 206a).

After a decade of labor strife and a series of inadequate contractual solutions the dispute reached a critical juncture in the 1968 negotiations because of the introduction of full container operations in major trade routes (App. B at 79a; App. C at 207a). The longshoremen's demand to load ("stuff") and unload ("strip") all containers was rejected (App. B at 79a; App. C at 207a). A strike then ensued for 57 days on the North Atlantic

[2] Petitioners New York Shipping Association, Inc. (NYSA) and Council of North Atlantic Shipping Associations (CONASA) and Respondent West Gulf Maritime Association (WGMA) are collective bargaining representatives for these longshore employers. NYSA represents shipping employers in the Port of New York, including the individual carrier petitioners (App. C at 204a-205a). CONASA represents constituent multi-employer associations in ports from Rhode Island to Virginia (App. C at 205a). WGMA is NYSA's counterpart in West Gulf ports in Texas and Louisiana.

coast and for more than 100 days in other Atlantic and Gulf ports (App. A at 8a). With the assistance of a federal mediator appointed by the President of the United States the carrier employers finally agreed with the longshoremen's union, the International Longshoremen's Association, AFL-CIO ("ILA"), upon the adoption of the Rules on Containers—essentially the same contractual provisions challenged in this case (App. A at 8a; App. B at 79a).

The Rules are a compromise (App. C at 262a). Longshoremen had a virtual veto over the introduction of containerization. This Court has recognized that it would have been lawful for the dockworkers to "insist on doing the work as it had always been done and try to prevent the employers from using container ships at all." *ILA-I*, 447 U.S. at 510. The longshoremen, however, did not obdurately impede technological progress. They agreed to give up their right to stuff and strip all genuine intermodal containers but refused to relinquish their right to those containers which are loaded or unloaded for hire within the local 50-mile port area (App. B at 79a).[3] The work they retain constitutes only about 20% of all container traffic (App. A at 9a; App. B at 79a). The shipping employers agreed to prevent the diversion of these still necessary work functions to nearby off-pier facilities.[4] This basic compromise enabled containerization to flourish, brought the benefits of intermodalism to the shipping public, and produced a monumental increase in longshore work productivity (App. C at 225a).

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[3] Off-pier stuffing and stripping for hire within the local port area does not involve origin-to-destination, intermodal transport. For most of its journey that cargo which is stuffed or stripped within the port area still moves breakbulk—handled repeatedly by employees of shippers, truckers, railroads and consolidators. The ocean container plays no part in the inland phase of the transport. The loading/unloading of the cargo a short distance from the piers, where virtually all off-pier consolidation facilities are clustered (App. C at 211a), does not provide any of the intermodal benefits of containerization. It serves only to allow cheap labor to purloin the longshoremen's rightful work.

[4] To induce on-pier performance of this work in the first instance, the shipping employers agreed that they would not make their containers available off-pier, so that cargo subject to the Rules would be delivered to the piers in uncontainerized form (App. C at 207a).

Adoption of the Rules on Containers did not put an end to strife but only changed the battlefield. Attacks upon the Rules under federal labor law raged in the courts and before the NLRB from 1973 until 1985. This Court's intervention in *ILA-I* in 1980 put an end to the pattern of triennial strikes that had marked the prior two decades.

History of Litigation

The litigation before the FMC began in 1973, when the Commission commenced an investigation of the Rules because they had been incorporated by a vessel carrier in its ocean tariff. *Sea-Land Service, Inc.—Proposed Rules on Containers* ("*Proposed Rules*"), Nos. 73-17 and 74-40 (FMC Apr. 13, 1973). Five years later the Commission held that the Rules were not entitled to the nonstatutory labor exemption and on their face violated the shipping laws. *Proposed Rules*, 21 F.M.C. 1 (1978). The District of Columbia Circuit sustained denial of the exemption but refused to accept the finding of a violation. It remanded for reconsideration, instructing the FMC to take into account labor factors and the role of collective bargaining in reaching a decision on the substantive shipping law issues. *Council of North Atlantic Shipping Associations* v. *FMC* (*CONASA*), 672 F.2d 171, 181 n.80, 188 n.135, 189 (D.C. Cir.), *cert. denied*, 459 U.S. 830 (1982).

On remand, the Commission summarily reaffirmed its original determination, claiming that labor factors had already been considered. *Proposed Rules*, 21 Shpg. Reg. Rep. (P&F) 852 (FMC 1982).[5] The *CONASA* court disagreed. It vacated the FMC's decision on remand and directed the FMC to stay its re-

[5] Commissioner Daschbach, who had been the Chairman of the Commission in 1978 when its original decision in *Proposed Rules* had been issued, dissented. He candidly admitted that the 1978 decision never took any labor factors into account. He noted that the decision on remand merely reaffirmed the Commission's earlier determination "without fresh analysis" thus "ignor[ing] a clear directive from the Court." When Commissioner Daschbach himself conducted the labor analysis prescribed by the *CONASA* court, he confessed that the earlier determination was wrong and concluded that he "would not now find...[the Rules on Containers] to be unlawful." *Proposed Rules*, 21 Shpg. Reg. Rep. (P&F) at 858-59.

consideration of *Proposed Rules* until it completed Docket No. 81-11, the case now before this Court. *CONASA*, Supplemental Opinion Following Remand, 21 Shpg. Reg. Rep. (P&F) 1057 (D.C. Cir. 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

While review in *Proposed Rules* was pending, the Rules were re-implemented in January 1981 in the wake of this Court's *ILA-I* decision. The Commission then initiated 81-11 to determine whether the Rules violate the shipping acts—the identical question presented in *Proposed Rules*. The Commission's assignment to its Chief Administrative Law Judge, John E. Cograve, expressly precluded any "further evidence regarding labor conditions."

When the *CONASA* court refused to affirm *Proposed Rules*, the FMC switched gears. On the same day it issued its decision on remand in *Proposed Rules*, it amended its interim order in 81-11 to permit the introduction and consideration of labor factors, acknowledging that the District of Columbia Circuit's decision in *CONASA* "made clear that labor policy factors must be considered in Shipping Act deliberations" (App. C at 229a).[6]

Docket 81-11 required more than nine months of discovery, consumed two full weeks of hearings, and produced more than 1,300 pages of transcript testimony and 248 exhibits—a record devoted almost entirely to evidence of labor considerations and the effect of the Rules (App. B at 150a). Complying with the directives of both the Commission and the *CONASA* court to take labor considerations into account, Judge Cograve concluded that the Rules are justified by labor considerations and do not violate the shipping statutes (App. B at 151a-152a; App. C at 262a-263a).

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[6] In an unrelated case the Commission affirmed an ALJ decision which noted that what *CONASA* "seems to say insofar as relevant here, is that the Commission is supposed to consider and weigh labor factors when deciding whether certain practices affecting certain shippers of containerized cargo are undue or unreasonable in violation of Sections 16 or 17 of the 1916 Act . . . ." *Port Authority v. New York Shipping Ass'n*, 23 Shpg. Reg. Rep. (P&F) 21, 46 (FMC 1985), *aff'g* 22 Shpg. Reg. Rep. (P&F) 1329, 1340 (Init. Dec. 1984).

Petitioners urged the Commission to affirm because, when labor factors are considered, the Rules meet the "just and reasonable" standards of the shipping statutes. Petitioners showed that the Rules were the *quid pro quo* for the longshoremen's relinquishment of their right to preclude containerization in its entirety and thus made possible full intermodalism for 80% of maritime cargo (App. C at 262a). Petitioners also demonstrated that the Rules do not interfere with the benefits of containerization but only retain for longshoremen work that is being diverted to nearby off-pier facilities. Finally, petitioners underscored Judge Cograve's finding that implementation of the Rules does not present any substantial threat to the continued viability of off-pier businesses.

The Decision of the FMC

The FMC refused to consider a reasonableness analysis based on labor considerations. Despite the prior mandates in *CONASA*, the collective bargaining origins of the Rules, and this Court's vindication of their lawfulness under the labor laws, the FMC limited its analysis to so-called traditional transportation factors and specifically excluded labor considerations (App. B at 74a-75a, 161a, 163a, 171a-172a, 175a). The Commission never explained why labor, without which no transportation enterprise can operate, is not a transportation factor. The FMC determined that on their face the Rules on Containers violate the substantive proscriptions of the shipping statutes (App. B at 74a). Having excluded all evidence of justification, the Commission concluded that the Rules had not been justified.

The linchpin of the FMC's decision is its claim that as a matter of law the Commission is not required or permitted to weigh labor considerations in determining whether the Rules violate federal shipping law (App. B at 74a-75a, 161a, 163a, 171a-172a, 175a). The Commission interpreted the Maritime Labor Agreements Act of 1980 as precluding the agency from considering labor policies in its substantive deliberations but had allowed these same factors to be used to temper the remedy to be fashioned by the Commission (App. B at 75a, 172a). Hence, the Commission stayed its cease and desist order for 90 days to allow management

and labor to achieve what has eluded judges, mediators, agencies, labor, management, and even the antagonists of the Rules for over a quarter of a century—a viable alternative agreement to protect the lawful work preservation rights of dockworkers from Maine to Texas (App. B at 75a, 192a).[7]

The Decision of the Court of Appeals

The court of appeals affirmed the FMC's determination. Despite the universal understanding to the contrary, the appeals court held that the *CONASA* decision did not mandate consideration of labor factors in substantive shipping act determinations (App. A at 34a-35a). The court considered this issue to be one of first impression, noting that, although the Supreme Court had recognized the difficulty and complexity of the issue, it had not yet confronted it (App. A at 3a, 11a, 63a). The circuit court found no guidance either in prior precedent or in the Commission's treatment of the issue (App. A at 36a-40a). Instead, the court developed its own analytical approach, recognizing that it was dealing with the accommodation of overlapping statutory schemes—in this case labor and shipping laws (App. A at 47a-56a).

In the circuit court's view an agency's obligation to harmonize diverse statutory policies comes into play only if its own organic statute conflicts with affirmative obligations or guaranteed rights under another statute or requires the agency to consider congressional policies embodied in other legislation (App. A at 47a-48a). If, however, the agency's own statute prohibits activities which are only privileged but not guaranteed by another statute,

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[7] In the wake of the Commission's decision several off-pier companies commenced complaint proceedings before the FMC seeking reparations for damages allegedly incurred from the implementation of the Rules. *See Direct Container Line* v. *Atlantic Container Line*, No. 88-14 (FMC filed May 6, 1988); *Votainer BV* v. *Atlantic Container Line*, No. 88-18 (FMC filed July 19, 1988). These proceedings were consolidated with an earlier reparations action filed shortly before the Commission's initiation of the Docket 81-11 investigation. *See International Ass'n of NVOCCs* v. *Atlantic Container Line*, No. 81-5 (FMC filed Jan. 22, 1981). The total reparations sought exceed $50 million. The reparations proceedings have been stayed pending completion of judicial review in this case.

then, in the circuit court's opinion, there would be no duty to harmonize (App. A at 47a).

The court of appeals concluded that the labor statutes in this case do not guarantee the right to preserve work but only grant a privilege to engage in collective bargaining over that subject (App. A at 56a-64a). Hence, the court approved the FMC's refusal to take labor factors into account in making its substantive shipping law determinations (App. A at 57a, 64a).

REASONS FOR GRANTING THE WRIT

1. Substantial Questions of National Scope and Importance

This case presents substantial questions as to whether work preservation is a right which the shipping laws must accommodate. This Court has already recognized that these questions, which involve overlapping congressional policies, "present difficult and complex problems." *ILA-I*, 447 U.S. at 512. The court of appeals shared these sentiments (App. A at 3a). It is readily apparent from the breadth of its opinion that the District of Columbia Circuit considered the intertwined federal labor and shipping questions substantial and significant. The court of appeals stayed its mandate pending disposition of the case by this Court.

The court of appeals fashioned a novel and unprecedented test concerning the duty of federal agencies to harmonize their own statutory mandates with the congressional purposes and policies embodied in other statutory regimes. This test has nationwide implications. Not only does it have an immediate practical effect upon the labor relations of the vital longshore industry,[8] but its legal ramifications also extend to every labor contract in the United States. Twice before this Court has recognized the national importance of the work preservation doctrine, when it

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[8] The ILA does not fall within the jurisdiction of the FMC and views the Commission's decision as an abrogation of rights guaranteed to its members by national labor law. The ILA has reopened the national master contract, which had been quickly and peacefully negotiated following this Court's *ILA-II* decision. The labor strife which beset the industry for more than two decades is bound to resume. *See* Solicitor General's Pet. for Cert. in *ILA-I* at 17 (filed Jan. 1980).

granted certiorari in *ILA-I* and *ILA-II*. Those decisions now face evisceration because of a test which permits them to be disregarded. National labor law rights of all workers are at stake.

The import of the decision of the court of appeals is not limited to the domains of labor and shipping. In our highly regulated society there is a need to define the scope of the obligation of administrative agencies to give effect to congressional policies embodied in statutes other than their own. The resolution of this question will affect every sector of the nation regulated by the broad network of federal administrative law. The formulation of criteria to guide agencies in carrying out this reconciliation process is a function of such national scope and importance that it should be done by this Court.

No less deserving of this Court's attention is the subsidiary question of the status of work preservation under national labor law. In the view of the court of appeals work preservation does not qualify as a labor law right (App. A at 57a-59a). It is merely a permissive goal that when achieved still remains at the mercy of other statutory proscriptions (App. A at 58a-59a). It would seem that other tribunals do not share this view; they consider work preservation to be a right under the labor laws. *Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974); *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1970). Indeed, the NLRB administrative law judge who upheld the Rules in *ILA-II* understood that the longshoremen "had a legitimate right to restrict the technology developed by the steamship companies to reclaim or preserve that work." *International Longshoremen's Association*, 266 N.L.R.B. 230, 252 (1983).

The status of work preservation under the labor statutes is critical to the disposition of this case. Under the reconciliation test adopted by the circuit court only rights qualify for statutory harmonization (App. A at 56a). If that test is wrong, if reconciliation does not depend upon rights guaranteed but upon congressional policies and purposes, *see infra* pp. 11-13, the labor law status of work preservation would still be important to the reconciliation process itself. The extent to which work preservation

should be accommodated in another statutory scheme will be informed by the degree of importance that work preservation enjoys in its own statutory domain. But the importance of defining the nature of work preservation extends far beyond the confines of this case.

If the court of appeals is correct in its denigration of work preservation, serious questions arise in other labor law contexts. In the area of pre-emption only activities actually protected or arguably prohibited by federal labor law are beyond state regulation. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 198, 207 (1978). To be protected, the activity must qualify as a right under § 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982). To trigger pre-emption, then, work preservation would have to fall within the § 7 category of "other concerted activities." If that were the case, work preservation would also be a right for purposes of statutory reconciliation under the test formulated by the court of appeals in this case. Hence, the circuit court's classification as a mere privilege, not a right, makes all work preservation agreements vulnerable to state regulation. Before what is perhaps the most important labor relations issue in this age of technological explosion is to be exposed to potentially conflicting jurisprudence based upon its status under the labor law, this Court should decide what that status is.

2. Conflict With Applicable Decisions of this Court

Statutory reconciliation extends not merely to rights and prohibitions expressly prescribed in the statutes at issue but to their underlying congressional policies and objectives. *Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 509 n.14 (1983) ("policies underlying other federal statutes"); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80 (1944) ("overlapping and at times inconsistent policies embodied in other legislation"); *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942) ("other and equally important Congressional objectives"); *see also Denver and Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485, 492-94 (1967). The principal elements of the test fashioned by the

court of appeals are directly at odds with the reconciliation approach in these cases.

Although the circuit court could not avoid the longstanding doctrine of statutory reconciliation, it managed to fashion three limitations which permit an agency in administering its own organic statute to disregard unmistakeable congressional policies embodied in others (App. A at 47a-48a). The first limitation, which the court of appeals labels a "false conflict," permits an agency to outlaw activity which is only privileged under another federal statute if the agency's own organic statute condemns it (App. A at 47a). The second limitation, styled a "true conflict," excuses reconciliation unless the agency's organic statute conflicts with an affirmative duty or guaranteed right expressly contained in another statute (App. A at 47a-48a). The third limitation, which the court of appeals refers to as the "incorporation" category, requires a court to defer to an agency's interpretation that its own statute does not reflect a congressional direction to engage in the reconciliation process (App. A at 48a).

The first two limitations are actually opposite sides of the same coin. In the view of the court of appeals the right/privilege distinction is the dispositive factor (App. A at 56a). Unless the agency is faced with an obligation imposed or a right guaranteed in another federal statute, statutory reconciliation is not required (App. A at 47a-48a). Decisions of this Court do not so constrain the will of Congress. There is no precedent of this Court which would support a limitation on an agency's duty to harmonize that would confine it to absolute rights and obligations. Legislative policies and objectives are not always carried out directly by statutory rights or prohibitions. Congress may achieve its aims in other ways. This Court has always considered reconciliation to be a process that deals with overall congressional design rather than with isolated statutory language.

The doctrine of reconciliation is not a mechanism for the vindication of private interests. It exists to promote the will of Congress, even when the congressional agenda is not effectuated through the prescription of express rights and duties. Regardless

of the status of work preservation as an express substantive right under federal labor law, this Court has recognized that "among the primary purposes protected by the Act is 'the purpose of preserving for the contracting employees themselves work traditionally done by them.'" *ILA-I*, 447 U.S. at 504 (citation omitted). The test adopted by the court of appeals, if allowed to stand, would frustrate this congressional purpose.

The third limitation created by the circuit court in this case is equally discordant with prior decisions of this Court. This limitation depends upon the notion that reconciliation is not required unless there appears in the agency's enabling statute some indication of a congressional desire that the agency take into account the desiderata of other statutes (App. A at 48a). The court of appeals misconstrues the doctrine of reconciliation.

The duty to harmonize has its origin not in the provisions of any particular legislation but in an overriding jurisprudential principle often articulated by this Court that "'when there are two acts upon the same subject, the rule is to give effect to both if possible.'" *California* v. *FPC*, 369 U.S. 482, 485 (1962), *quoting United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *see also Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963).[9] Never has this Court conditioned reconciliation upon the presence of a statutory direction. Indeed, it has not hesitated to require harmonization even in the

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[9] The court of appeals was mistaken in thinking that *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962) and *Local 1976, United Brotherhood of Carpenters and Joiners* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958), afford contrary authority. The *Sand Door* Court recognized that the Interstate Commerce Commission (ICC) might decide to modify its position that common carrier obligations are not excused by a hot cargo clause and adopt an accommodation under which "because of certain compelling considerations, a carrier is relieved of its usual statutory duty." 357 U.S. at 109. A plurality of the *Burlington* Court directed the ICC to accommodate labor factors by "requiring the carriers to provide service in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under federal labor law." 371 U.S. at 177 (concurring opinion of Goldberg, J.). The court of appeals in this case is out of touch with the true attitude of this Court—that diverse congressional schemes must be harmonized even without a specific direction in either of the overlapping statutes.

absence of any indication in either of the competing statutes that Congress contemplated that exercise. *See, e.g., FTC* v. *A.P.W. Paper Co.*, 328 U.S. 193, 202 (1946); *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47 (1942).

However, when the prohibitions in the agency's organic statute are not absolute, when the statute contains terms like "public interest," "just and reasonable," "lawful object," "just and adequate," as do the federal shipping statutes at issue in this case, then the duty to reconcile becomes all the more compelling. *See, e.g., NAACP* v. *FPC*, 425 U.S. 662 (1976) ("just and reasonable" rates); *Denver and Rio Grande Western R. Co.* v. *United States*, 387 U.S. 485 (1967) ("public interest" and "lawful object"); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) ("just and adequate" rules); *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944) ("just and reasonable" and "public interest"). This kind of statutory language is not a rarity. It permeates the entire United States Code. A Westlaw search revealed the existence of literally thousands of statutory provisions containing the type of language that this Court has recognized to be a congressional facilitation of the duty to harmonize.[10]

Although the court of appeals understood the significance of Congress' choice of words, it nonetheless converted them into a catalyst not of reconciliation but of conflict. Under the circuit court's formulation the presence of capacious language in the agency's organic statute actually provides the means for the agency to escape the duty to reconcile. In the view of the court of appeals an agency can, under the guise of interpretation, dispense with even the attempt to reconcile, and a reviewing court is powerless under the standards of *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984), to correct this omission out of deference to the agency's expertise in construing its own statute (App. A at 40a-42a).

The only qualification the court of appeals would impose is that the agency's interpretation rejecting reconciliation "need

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[10] The term "reasonable" appears in more than 3,500 sections; "just" or "unjust" in more than 400; "fair" or "unfair" in more than 1,400.

only be not inconsistent with" the policies of the agency's own legislation (App. A at 61a). This qualification is self-fulfilling, since an outright refusal to consider the policies embodied in another statute will always appear to promote the agency's own statutory mission. In effect the court of appeals is giving agencies unbridled discretion to disregard important congressional policies.[11]

Petitioners realize that this tribunal does not sit to correct isolated error in individual cases. Here, however, the circuit court's rewriting of the doctrine of statutory reconciliation is directly at odds not only with the prior decisions of this Court but with the overriding congressional design expressed throughout the body of federal administrative law that agencies are not islands unto themselves but parts of a national system entrusted with a duty to carefully accommodate their own statutory mandates with other, equally important congressional policies. *See Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 516-17 (1983) (dissenting opinion of Brennan, J.). Review by this court is warranted whenever any circuit distorts a fundamental principle of federal law. Where, as here, that principle pervades the entire fabric of the federal system of administrative agencies, review is all the more necessary. When the aberration is promulgated by the very circuit that is the principal overseer of all federal agencies, Supreme Court review is essential.

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[11] The mischief to which uncritical deference can lead is illustrated by this very case. The Commission's refusal to harmonize was based not upon an interpretation of any substantive shipping law provision but upon its reading of the Maritime Labor Agreements Act (App. A at 37a; App. B at 129a, 134a-135a). The court of appeals held that it owed no deference to the Commission's construction of this purely jurisdictional statute and found the Commission's interpretation to be incorrect (App. A at 39a-40a). Once the circuit court had rejected the only basis on which the FMC refused to reconcile, there was nothing to which the circuit court owed deference. It need not be belabored that the 90-day stay that the FMC attached to its remedy is hardly a genuine attempt at harmonization of the shipping and labor laws. Moreover, fashioning of a remedy in no way entails expert interpretation of any provision of the shipping statutes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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